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No. 656

Supreme Court of the United States

October Term, 1946

A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

LAWRENCE S. HELMERS, ET AL.,

Respondents.

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This Court has for consideration two petitions for certiorari, in two actions by the same receiver of the same national bank on the same stock assessment. In each the action is against shareholders of BancoKentucky Company. In each case, the same question is involved. The only difference is that in one case the defendants resided in Pennsylvania, were sued in the District Court there and were held liable.* Their prayer for certiorari is *Cope* v. *Anderson #593.* In the other case, the defendants resided in Ohio, the petition against them was dismissed and the Receiver asks for certiorari. *Anderson* v. *Helmers #656.*

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* *Anderson* v. *Andrews*, 62 F. Supp. 705, 156 F. (2d) 973.

The Receiver, in response to the *Cope* petition, has admitted that a conflict exists. He feels that all shareholders presenting similar defenses should be treated alike. The respondents in the *Helmers* case oppose certiorari. Their brief which contends there is no conflict between the Circuits and that the questions are dissimilar is pure *casuistry*. When it was to their interest they contended strenuously that the two cases were identical and the decisions were in direct conflict. In their brief, filed with the Court of Appeals for the Sixth Circuit (page 14), they stated:

> "*The decision of the District Court in the instant case is in direct conflict with the Andrews case.*" (Italics supplied.)

The admitted conflict between the District Courts continued when the disagreement was transferred to the two Appellate Courts. That there was a conflict was recognized by both Appellate Courts. The Third Circuit stated [156 Fed. (2d) 972, 975]:

> "In reaching this conclusion, we are quite conscious that we are in disagreement with our brethren of the Sixth Circuit in the decisions they reach in *Helmers* v. *Anderson*. . . ."

The Sixth Circuit handed down its opinion before the ruling in the Third Circuit. At that time the only opinion in the Pennsylvania case was a decision in the District Court. The Sixth Circuit stated [156 F. (2d) 47, 52]:

> "*The same question* was presented to the District Court of Pennsylvania in *Anderson* v. *Andrews*, 62 F. Supp. 705, where the same Receiver brought suit against stockholders residing in Pennsylvania. It was there held under a *similar* Pennsylvania borrowing statute. . . ."

Respondents contend that if any conflict exists, it is merely a conflict as to state law. This is incorrect. The borrowing act of Ohio only comes into play "if the laws of any state *or country* where the cause of action arose . . ." limits the time for commencement of the action to a less number of years than the statutes of Ohio. Similarly, the borrowing act of Pennsylvania only applies when a cause of action has been barred "by the laws of the state *or country* in which it arose." Both acts make a distinction between "state" and "country." No interpretation of the statutes of either state is involved. The question in both cases is "Where does the cause of action arise?" This is the source of the conflict between the two decisions.

The argument that the question—where the cause of action arose—is a matter of state law, would seem to be adequately characterized by the following language of this Court in *Seabury* v. *Green*, 294 U. S. 165, 168:

> "Respondent maintains that no federal question is involved. To the extent the opinion implies that liability of stockholders of national banks is a creature of or depends upon a statute of South Carolina, the assumption is so plainly without foundation as *to suggest that it must have been inadvertently made.*" (Emphasis added.)

The Circuit Court of Appeals for the Third Circuit held that this was a federal assessment arising under federal law. It is not "a state created right, but one created by United States statute" [156 F. (2d) 975]. The Court held that the cause of action arose in the United States which is a "country." It concluded: "This is not the kind of cause of action which is properly described as arising within the state of Kentucky" [156 F. (2d) 975].

On the other hand, the Sixth Circuit Court of Appeals pointed out that the problem presented was a ruling on the

narrow question of "where the cause of action arose?" and it concluded, "that the cause of action herein sued on arose in Kentucky."

This is not a conflict with respect to state law. It is a conflict on an important matter of Federal law. Certiorari was granted in *Rawlings* v. *Ray*, 312 U. S. 96, and in *Fisher* v. *Whiton*, 317 U. S. 217, because of a conflict in decisions as to "*when*" a cause of action for federal bank stock assessment arose. A supplementary ground of certiorari was "the importance of the question in the administration of insolvent national banks" [317 U. S. 219]. Of equal importance is the question—"*where*" does the cause of action arise? Both the *Rawlings* case and the *Fisher* case were admitted after a change in banking laws reduced the number of banks whose stockholders were subject to assessment [217 U. S. 219], yet the importance of the problem was still deemed to exist.

In an effort to create a difference between the two cases, respondents point to the stipulation present here, but not in the Pennsylvania case, to the effect that the business of the bank was carried on and transacted in Kentucky. The stipulation merely incorporated the law that a national bank cannot transact business outside of the state named in its charter as the place where it should do business. Branch banking beyond those limits is forbidden. This does not mean that the National Bank of Kentucky was confined to the state of Kentucky in the scope of its activities. As evidenced by these two cases, its shareholders reside throughout the United States. It made loans to corporations doing business in other states and it owned real estate in Louisiana. The stipulation was present in the record before the Sixth Circuit Court of Appeals when respondents argued that the lower court decisions were in conflict.

It is respectfully submitted that petitions for certiorari in both the *Cope* case and the instant case should be granted.

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